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Supreme Court, U.S.
FILED
JUN 28 1993
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1992

BOB YARI,

Petitioner,

v.

WINDSOR PROPERTIES, INC. AND JOHN GRANTHAM, TRUSTEE,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the United States Court of Appeals for the Fifth Circuit err in holding that an obligation to deposit earnest money, contained in an accepted option contract, was insufficient consideration to support the option contract?

LIST OF PARTIES

The undersigned counsel of record certifies that the following listed persons were parties to the proceeding in the court whose judgment is sought to be reviewed.

1. Bob Yari as Claimant and Appellant.
2. Windsor Properties, Inc., as Debtor and Appellee.
3. John R. Grantham, as Trustee and Appellee.
4. Robert Alan York, Edward L. Rothberg, Alfred C. Corona, and Weycer, Kaplan, Pulaski & Zuber, P.C., 1400 Summit Tower, Eleven Greenway Plaza, Houston, Texas 77046, attorneys for Claimant/Appellant.
5. Louis K. Bonham and Honigman, Miller, Schwartz and Cohn, 3100 First Interstate Bank Plaza, 1000 Louisiana Street, Houston, Texas 77002-5011, attorneys for Windsor Properties, Inc. and John R. Grantham, Trustee, Debtor/Appellee.

To the best knowledge of the undersigned, Windsor Properties, Inc. has no parent corporation nor any non-wholly owned subsidiaries.

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PRIOR OPINIONS

I. Opinion of the United States Court of Appeals for the Fifth Circuit (dated February 26, 1993) (attached at Appendix I)

II. Opinion/Order of the United States District Court, Southern District of Texas, Houston Division (dated July 22, 1992) (attached at Appendix II)

III. Order of the United States Bankruptcy Court, Southern District of Texas, Houston Division (entered July 19, 1991) (attached at Appendix III)

IV. Order on Petition for Rehearing of the United States Court of Appeals for the Fifth Circuit (dated March 29, 1993) (attached at Appendix IV)

V. Order on Petition for Rehearing of the United States District Court, Southern District of Texas, Houston Division (entered September 1, 1992) (attached at Appendix V)

JURISDICTIONAL STATEMENT

The Judgment that Petitioner requests this Court review is that of the United States Court of Appeals for the Fifth Circuit entered on February 26, 1993. A subsequent petition for rehearing, filed with the United States Court of Appeals for the Fifth Circuit, was denied on March 29, 1993. This Court has jurisdiction over the petition for writ of certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL/STATUTORY PROVISIONS INVOLVED

Petitioner does not believe this case directly impacts any Federal Constitutional or statutory provisions.

Rather, this case involves the misapplication of the law of the State of Texas by Federal District and Appellate Courts.

STATEMENT OF THE CASE

I. Procedural History

Bob Yari's ("Yari") Petition for Writ of Certiorari in this matter arises from a Chapter 11 bankruptcy proceeding filed by Windsor Properties, Inc. ("Windsor"). Thus, the basis for jurisdiction in the court of first instance in this matter resulted from 28 U.S.C. § 1334. In August, 1989, prior to the Chapter 11 filing of Windsor, Yari and Windsor executed an Earnest Money Contract for the sale of the Windsor Plaza Shopping Center ("Shopping Center") at a price of $15 million. (T.2-1-7).[1] Rather than perform its obligations under the Earnest Money Contract by conveying the Shopping Center to Yari, Windsor sold the Shopping Center to a third party for $18 million shortly after bankruptcy. (T.2-1-3). Pursuant to applicable bankruptcy law, Yari timely filed a proof of claim for damages in the amount of $3 million representing the difference between the purchase price set forth in the Earnest Money Contract and the actual value of the Shopping Center. (T.2-A).

On March 30, 1990, Windsor filed an Objection to Yari's claim. (T.2-B). After his appointment as trustee,

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[1] References to the transcript will appear as (T. ___).

John R. Grantham ("Trustee") filed an Amended Objection raising numerous additional issues. (T.2-H). Thereafter, the parties commenced preparation for trial on the merits. In connection with the preparation of a Joint Pretrial Statement, Yari and the Trustee entered into an extensive stipulation of facts. (T.2-L).

On June 26, 1991, the Trustee filed a motion for summary judgment seeking to disallow Yari's claim. (T.2-K). The motion was based on two (2) of the issues set forth in the Amended Objection. *Id.* First, the Trustee alleged that the Earnest Money Contract was unenforceably vague. (T.2-K-2). The bankruptcy court rejected this argument. (T.2-P-4). Second, the Trustee argued that the Earnest Money Contract constituted a revocable option contract to purchase the Shopping Center, which was revoked before Yari deposited $150,000 in earnest money. (T.2-K-6). Upon this ground, the bankruptcy court granted the Trustee's motion for summary judgment and disallowed Yari's claim. (T.2-P-16).

On July 23, 1991, Yari filed his Notice of Appeal to the United States District Court for the Southern District of Texas, Houston Division (T.1-58) on the ground that the Earnest Money Contract was irrevocable. (T.1-42). After hearing oral arguments on July 20, 1992, the District Court entered an order affirming the bankruptcy court's order. (T.1-20). The District Court avoided the issue of whether Yari's obligation to pay earnest money was valid consideration. Rather, the District Court affirmed the Bankruptcy Court's ruling by holding that the contract contemplated actual payment of earnest money prior to contract formation. (T.1-20). In response, Yari filed a Motion for Rehearing (T.1-15), which motion was denied

by the District Court by an order entered on September 1, 1992. (T.1-3).

Yari then timely filed his Notice of Appeal to the United States Court of Appeals for the Fifth Circuit. (T.1-1). On February 26, 1993, the United States Court of Appeals for the Fifth Circuit issued its opinion and order affirming the decision of the District Court. (Appendix I). Yari then filed a Petition for Rehearing, which petition was denied by the United States Court of Appeals for the Fifth Circuit by an order dated March 29, 1993. (Appendix IV). Yari now files this Petition for Writ of Certiorai to the United States Supreme Court.

II. Statement of Facts

Yari is a self-employed real estate developer and investor who resides in Los Angeles, California. (T.2-L-1). In early 1989, Yari became interested in purchasing the Shopping Center which was then owned by Windsor. *Id.* Yari began negotiating with Windsor, through its authorized representatives, to purchase the Shopping Center. *Id.* These negotiations culminated in an Earnest Money Contract executed by Windsor on August 10, 1989, and by Yari on August 12, 1989. *Id.*

By the terms of the Earnest Money Contract, Yari agreed to purchase the Shopping Center from Windsor for a total of $15 million. (T.2-L-7). The Earnest Money Contract further provided that "within two (2) days after

the effective date[2] hereof, Purchaser (Yari) will deliver to First American Title Insurance Company . . . the sum of One Hundred Fifty Thousand and No/100 Dollars ($150,000.00) in cash ("Earnest Money"), which shall be held in an interest bearing account or accounts and at a federally insured lending institution(s), all acceptable to Purchaser." (T.2-L-7).

As stated previously, Windsor executed the Earnest Money Contract on August 10, 1989 (T.2-1-2), and Yari executed same on August 12, 1989. *Id.* On August 14, 1989, Windsor repudiated the contract. *Id.* On the same day, Yari delivered the Earnest Money Contract to the title company. On August 15, 1989, Yari timely satisfied his obligation under the contract by depositing the $150,000 earnest money. (T.2-L-3).

On September 1, 1989, Windsor filed its Petition for Relief under Chapter 11 of the Bankruptcy Code. *Id.* On or about February 23, 1990, the bankruptcy court granted Windsor's motion to reject Yari's contract and approved Windsor's application to sell the Shopping Center to Transamerica Properties, Inc. (T.2-L-4). A total of $18 million was allocated as the purchase price for the Shopping Center. *Id.* Yari then timely filed a proof of claim for contract rejection damages in the amount of $3 million representing the difference between the purchase price set forth in the Earnest Money Contract and the value of

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[2] The effective date of the contract is the date it was delivered to the title company. The effective date does not define the point at which the contract is formed, but defines the point at which the time period for performance of obligations begins to run.

the Shopping Center as indicated by the sale to Transamerica Properties, Inc. *Id.*

REASONS FOR ALLOWING THE WRIT

I. The United States Court of Appeals for the Fifth Circuit Was Incorrect in Holding That an Obligation to Deposit Earnest Money was Insufficient Consideration To Support An Option Contract

The United States Court of Appeals for the Fifth Circuit was incorrect in holding that an obligation to deposit earnest money was insufficient consideration to support an option contract. Yari's obligation to deposit earnest money within two (2) days after the effective date of the Earnest Money Contract was sufficient consideration to make the option binding upon Windsor.

A. An option under a contract requires independent consideration.

Texas law defines an option contract as follows:

> An option contract has two components: [1] the underlying contract which is not binding until accepted, and [2] the covenant to hold open to the optionee the opportunity to accept.

Hott v. Pearcy/Christon, Inc., 663 S.W.2d 851, 853 (Tex. App. – Dallas 1983, writ ref'd n.r.e.). Yari acknowledges

that unless an offer or an option is supported by independent consideration, there is, until acceptance, complete want of mutuality and no contract between the parties. *Womack v. Dolton Adding Machines Sales Co.*, 285 S.W. 680, 681 (Tex. Civ. App. – El Paso 1926, no writ). Unless supported by independent consideration, an offer or option may be withdrawn at any time before acceptance. *Norwood v. Adams*, 51 S.W.2d 625, 627 (Tex. Civ. App. – Amarillo 1932, no writ). Nonetheless, Yari contends that the option in this instance was supported by independent consideration making the option irrevocable.

B. The United States Court of Appeals for the Fifth Circuit misconstrued the independent consideration supporting the option contained in the Earnest Money Contract.

In order to properly determine the independent consideration supporting the option in this case, a distinction must be made between Yari's promise to pay earnest money as a condition of acceptance versus an actual current obligation of Yari. A reading of the Earnest Money Contract involved in this matter establishes that the parties intended Yari's promise to pay earnest money to be an actual obligation and not a condition precedent to the formation of the contract. The section of the Earnest Money Contract dealing with the deposit of earnest money by Yari reads as follows:

> Within two (2) days after the effective date hereof, Purchaser will deliver to First American Title Insurance Company . . . the sum of One Hundred Fifty Thousand and No/100 Dollars

> ($150,000.00) in cash ("Earnest Money"), which shall be held in an interest bearing account or accounts and at a federally insured lending institution(s), all acceptable to Purchaser.

(T.2.-L-7). This language, in and of itself, indicates that both parties considered the Earnest Money Contract to be formed prior to Yari's deposit of the earnest money, and that the parties intended that Yari's promise to deposit the earnest money constituted an obligation which forms the independent consideration for the option. The parties clearly did not intend to make the actual payment of earnest money a condition precedent to the formation of the contract.

Additionally, it is important to note that at the time Windsor repudiated the Earnest Money Contract, both parties had already signed it. (T.2-L-2). Thus, this is not a situation in which one party made an offer to purchase or to sell a piece of property and was awaiting the acceptance of another party. Rather, a reading of the contract indicates that both parties had reached an agreement regarding the terms of the sale of the property, which terms included Yari's obligation to subsequently pay a defined amount of earnest money. As such, Yari's actual and current obligation to deposit the earnest money, which obligation was timely fulfilled, provided the independent consideration to make the option contract irrevocable.

II. The Holding of the United States Court of Appeals for the Fifth Circuit in this Case Is in Conflict With The Prior Opinion Of the Texas Supreme Court in *Hudson v. Wakefield*

Texas law is clear that mutual reciprocal obligations between contracting parties constitute sufficient consideration to support a binding contract. *Texas Gas Util. Co. v. Barrett,* 460 S.W.2d 409, 412 (Tex. 1970). This is the case not only in general contract situations, but also, more specifically, in earnest money contracts. *Hudson v. Wakefield,* 645 S.W.2d 427, 430 (Tex. 1983). Contrary to *Wakefield,* the United States Court of Appeals for the Fifth Circuit construed the contract as requiring actual delivery of the earnest money as a condition precedent to contract formation as opposed to interpreting Yari's current and actual obligation to deliver earnest money as appropriate independent consideration for the option.

In *Wakefield,* the Texas Supreme Court addressed the situation in which two (2) parties entered into an earnest money contract for the purchase of certain land. *Id.* at 427. In conjunction with the contract, the purchasers delivered $5,000 in earnest money in the form of a check which was later returned for insufficient funds. *Id.* at 428. After learning of the returned check, the sellers entered into a contract to sell the same property to a third party. *Id.* After finding out about the insufficiency of the check, the purchasers attempted in numerous ways to tender the $5,000 in earnest money. *Id.* Each of these tenders was refused by the sellers. *Id.* The purchasers then filed suit against the sellers seeking specific performance under the earnest money contract. *Id.* The trial court granted the

sellers' motion for summary judgment on the grounds that the agreement under which specific performance was sought was not a contract because the check for the earnest money was returned due to insufficient funds. *Id.* at 427.

In analyzing the facts of *Wakefield,* the Texas Supreme Court determined that "the threshold question is whether the earnest money provision of the contract amounted to a condition precedent or a covenant." *Id.* at 428-29. The Court acknowledged that if the actual payment of the earnest money was a condition precedent to the formation of the contract, the sellers of the property would be correct in their assertion that the contract formation failed for lack of consideration, thus making the agreement a revocable offer. *Id.* at 429. The Court also noted, however, that "in order to determine whether a condition precedent exists, the intention of the parties must be ascertained and that can only be done by looking at the entire contract." *Id.* at 430. The Court determined that a full reading of the earnest money contract supported the conclusion that it was intended as a penalty for breach of contract and not as a condition precedent to the formation of the contract. *Id.* As such, the failure to deposit such monies as contemplated by the earnest money contract would raise a fact question as to whether such failure was such a material breach of the contract as to warrant the seller's repudiation of the earnest money contract. *Id.* at 431.

Furthermore, the United States Court of Appeals for the Fifth Circuit has previously acknowledged that the Texas Supreme Court's decision in *Wakefield* is controlling on an issue such as this. *Martin v. Xarin Real Estate, Inc.,*

703 F.2d 883, 887 (5th Cir. 1983). In reviewing a factual situation very similar to *Wakefield,* this court found that the deposit of earnest money pursuant to an earnest money contract was a covenant which, if not fulfilled, would lead to a breach of contract cause of action, as opposed to the non-formation of a contract. *Id.* The Fifth Circuit Court of Appeals held that when the buyer signed the earnest money contract, he became contractually bound to make the earnest money deposit with the title company. *Id.* at 887.

In its opinion in this matter, the United States Court of Appeals for the Fifth Circuit reached the conclusion that the option in the instant appeal was nothing more than a *nudum pactum,* or a voluntary promise without any other consideration than mere good will or natural affection. *See* Appendix I at 5. The Fifth Circuit Court of Appeals failed to recognize that the law as stated by the Texas Supreme Court is that the deposit of earnest money constitutes an obligation rather than a condition precedent to contract formation. Clearly, the intent of the parties in this matter was that Yari's promise to deposit earnest money was a current obligation and not a condition precedent to contract formation. The United States Court of Appeals for the Fifth Circuit has misapplied the law of the State of Texas in this matter. As such, this Court should grant Petitioner's request for a writ of certiorari in order to correct this misapplication of law.

III. Yari's Petition For Writ Of Certiorari Should Be Granted Because The Ruling Of The Fifth Circuit Court Of Appeals Undermines The Integrity Of Option Contracts Which Are in Wide Use in The State Of Texas

Earnest money contracts such as the one involved in this case are in wide use in the State of Texas. Realizing the business practicalities of transferring large sums of earnest money, it is a common practice for the parties to agree that the buyer is not required to make an immediate payment of earnest money, but instead is provided a fixed period of time in which to make the payment. The ruling of the Fifth Circuit destroys the integrity of these widely used contracts.

The Fifth Circuit has held that even though sophisticated business persons (1) agree to all of the material terms of the transaction, (2) expressly agree that the buyer is obligated to make a payment of earnest money, (3) expressly agree to allow the buyer two days in which to make the earnest money payment, and (4) memorialize the agreed terms in a written document signed by both parties, an enforceable contract does not exist until the buyer makes the earnest money payment. Such a holding ignores the intention of the parties to the agreement and, if left to stand, calls into question the validity of numerous earnest money contracts which are signed and accepted each day in the State of Texas.

Reliance by business persons upon the validity and enforceability of their business contracts is vital to the economic health of the state and the nation. Under the

ruling of the Fifth Circuit, a Buyer who has been contractually provided two (2) days to make the required earnest money payment cannot rely upon that agreement because the Seller can revoke the contract during that time with impunity. Furthermore, since no contract was formed, a Seller who acts in good faith and has removed his property from the market has no remedy against a Buyer who signed an earnest money contract but failed to make the earnest money payment. In short, under the current ruling of the Fifth Circuit Court of Appeals, parties cannot rely on the signatures placed on a written document as having any legal effect. The Court should grant the Petition for Writ of Certiorari in this case so that the error of the Fifth Circuit may be corrected and confidence in the validity of business contracts will not be undermined.

CONCLUSION

The United States Court of Appeals for the Fifth Circuit erred in affirming the District Court and the Bankruptcy Court because there was sufficient independent consideration to support the option contained in the Earnest Money Contract based on Yari's actual and current obligation to pay earnest money. For the reasons set forth above, Yari requests that this Court grant his Petition for Writ of Certiorari, review the decision of the United States Court of Appeals for the Fifth Circuit, reverse such

decision, and remand this cause to the Bankruptcy Court for a new trial.

Respectfully submitted,

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APPENDIX I

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92-2773
Summary Calendar

IN THE MATTER OF: WINDSOR PROPERTIES, INC.

Debtor.

BOB YARI,

Appellant,

VERSUS

WINDSOR PROPERTIES, INC.,

Appellee.

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-91-2281)
(Filed Feb. 26, 1993)

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

This is an appeal from a district court's order affirming a bankruptcy court's decision disallowing the claim

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[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

of Appellant, Bob Yari. Yari filed a claim in the Appellee's Chapter 11 proceedings, seeking damages for an alleged breach of contract. When his petition was denied Yari appealed to the district court, which affirmed the bankruptcy court's decision. Likewise, we find no error and affirm.

I.

Bob Yari negotiated to purchase the Windsor Plaza Shopping Center from Windsor Properties, Inc. ("Windsor"). An earnest money contract between them was signed by Windsor on August 10, 1989, and by Yari on August 12, 1989. Under this agreement, Yari would purchase the property for $ 15 million. Additionally, the contract called for Yari to deliver $150,000 in earnest money within two days of the effective date of the contract. Before this earnest money was paid, Windsor notified Yari by telegram that the agreement was cancelled.

Windsor thereafter instituted bankruptcy proceedings under Chapter 11. 11 U.S.C. §§ 1101-1174 (1979 & Supp. 1992). The bankruptcy court approved a sale of the shopping center to a third party for $ 18 million. Yari then filed proof of claim for breach of contract, contending that he was entitled to $ 3 million in damages as a result of Windsor's repudiation of the earnest money contract and the subsequent sale of the property. The bankruptcy court granted summary judgment against Yari. The district court affirmed, holding that the earnest money contract failed for want of consideration.

II.

Although this is an appeal from a district court's review of the bankruptcy court's order, "at this stage we engage in a review of the bankruptcy court's findings just as we would in an appeal coming from a trial in the district court." *In re Killebrew,* 888 F.2d 1516, 1519 (5th Cir. 1989). Findings of fact are accepted if not clearly erroneous, and issues of law are reviewed de novo. *Id.*

III.

Appellant argues that "the affirmative covenant contained in the contract that Yari would pay earnest money was sufficient consideration to form a contract." Appellant's Brief at 5. The district court concluded that the contract did not call for the mere promise to pay the earnest money, rather actual payment was necessary as consideration to support the option.

The parties conceded that the contract at issue is an option contract.[2] If no consideration is paid, an option to purchase realty is revocable during its term. *Riley v. Campeau Homes (Texas), Inc.,* 808 S.W.2d 184, 188 (Tex. Ct. App. – Houston 1991, writ dism'd); *Hott v. Pearcy/Christon, Inc.,* 663 S.W.2d 851, 853 (Tex. Ct. App. – Dallas 1983, writ ref'd n.r.e.). The general rule is that mutual reciprocal obligations between contracting parties are sufficient consideration to crate a binding contract. *Id.* However, reciprocal obligations are not sufficient consideration for an

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[2] Both parties apparently conceded this point in the district court. Since this issue was not contested on appeal, we accept this characterization of the contract.

option contract. *See Baldwin v. New*, 736 S.W.2d 148, 151 (Tex. Ct. App. – Dallas 1987, writ denied); *Hott*, 663 S.W.2d at 853. Consequently, the offeror of the option is free to revoke its offer "unless and until an independent consideration is paid." *Id.*

In the instant case, it is undisputed that Yari received notice of the cancellation of the option to purchase before any money changed hands. Nevertheless, Yari advances the argument that his covenant to pay earnest money suffices as valid consideration to support the option to purchase, citing *Martin v. Xarin Real Estate, Inc.*, 703 F.2d 883 (5th Cir. 1983), and *Hudson v. Wakefield*, 645 S.W.2d 427 (Tex. 1983). Both of these cases are distinguishable from the present dispute.

In *Martin*, the contract provided that *"[s]imultaneously with the execution hereof,* [Xarin] has deposited as earnest money . . . the sum of $50,000.00 in cash." *Martin*, 703 F.2d at 885 (emphasis added). Likewise, in *Hudson*, the contract recited that "Purchaser *has delivered* to Freestone County Title, Fairfield, Texas, the sum of $5,000.00 the Escrow Deposit. . . . " *Hudson*, 645 S.W.2d at 428 n.5 (emphasis added). In both of these cases the earnest money was paid by checks which were later returned for insufficient funds. Both of the contracts at issue, however, clearly contemplated that consideration was paid for the purchase options.

The agreement in this case instead recites that "Within Two (2) days after the Effective Date hereof, Purchaser *will deliver* . . . " the required earnest money (emphasis added). No consideration was given to secure

the option, and Windsor effectively cancelled the agreement before consideration was paid. *See Hott v. Pearcy/Christon, Inc.*, 663 S.W.2d 851, 853-54 (Tex. Ct. App. – Dallas 1983, writ ref'd n.r.e.) (payment to be made within sixteen days from contract's effective date; cancellation notice given prior to tender of payment terminates option); *cf. Culbertson v. Brodsky*, 788 S.W.2d 156, 157-58 (Tex. Ct. App. – Fort Worth 1990, writ denied) ($5,000 check left with title company not valid consideration because title company forbidden to cash check until expiration of the option).

IV.

The failure of consideration is fatal to the contract at issue. Because the vendor timely cancelled the option to purchase, the *nudum pactum* is unenforceable. The judgment of the district court is AFFIRMED.

APPENDIX II

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BOB YARI, Appellant, v. WINDSOR PROPERTIES, INC. and JOHN GRANTHAM, TRUSTEE, Appellees.	§ § § § § § § § § §	CIVIL ACTION NO. H-91-2281

ORDER
(Filed Jul. 22, 1992)

This case represents an appeal of an order granting summary judgment in favor of appellees Windsor Properties, Inc. ("Windsor") and John Grantham, Trustee ("Trustee"). Judge William Greendyke entered the order on July 19, 1991, in bankruptcy proceedings styled *In re Windsor Properties, Inc.*, Bankruptcy No. 89-06470-H4-11.

Appellant Bob Yari ("Yari"), a real estate developer and investor, entered into negotiations with Windsor to purchase certain real property known as the Windsor Plaza Shopping Center. Record, Exhibit L at 1. Yari and Windsor's president, J.P. Boone ("Boone"), executed an Earnest Money Contract ("the contract") which provided, *inter alia*, that Yari would deliver $150,000 in earnest money within two days. *Id.* at 1-2 and attached exhibit 1. On August 14, 1989, Boone sent Yari a telegram withdrawing the offer to sell the shopping center. *Id.* at 3 and

attached exhibit 2. The following day, Yari deposited the $150,000 in earnest money. *Id.* at 3.

On September 1, 1989, Windsor filed its petition seeking relief under 11 U.S.C. §§ 1101-1174 ("Chapter 11"). *Id.* In connection with the Chapter 11 proceedings, Windsor sold the shopping center for $18,000,000. *Id.* at 4. Yari timely filed a proof of claim for $3,000,000. *Id.* The bankruptcy court disallowed the claim on summary judgment. Record, Exhibit Q.

Both parties agree that the contract at issue constitutes an option to buy the shopping center. *See* Document #3 at 4. As such, the contract required consideration for both the option and the underlying contract. *Culbertson v. Brodsky*, 788 S.W.2d 156, 157 (Tex. App. – Fort Worth 1990, writ denied) (citing *Hott v. Pearcy/Christon, Inc.*, 663 S.W.2d 851, 853 (Tex. App. – Dallas 1983, writ ref'd n.r.e.)). Further, unless the independent consideration is paid for the option, the option is revocable during its term. *Id. See also Bowles v. Fickas*, 140 Tex. 312, 167 S.W.2d 741, 742-43 (1943). Yari argues that his promise to deposit the earnest money amounts to sufficient consideration to support the option and that actual payment was unnecessary. Document #3 at 4-5. The contract, however, does not recite a promise to pay; it provides for payment. Record, Exhibit L, attached exhibit 1. The earnest money provision states, "Purchaser will deliver . . . the sum of One Hundred Fifty Thousand and No/100 Dollars ($150,000.00) in cash. . . . " *Id.* The Court determines that the contract contemplates actual delivery of the earnest money as consideration for the option. Therefore, the Court finds that Windsor effectively revoked its offer to

sell the shopping center by telegram before consideration passed to hold the option open.

Based on the foregoing, the Court

ORDERS that the Order of the bankruptcy court granting summary judgment in favor of Windsor is AFFIRMED.

SIGNED at Houston, Texas, on this the 22 day of July, 1992.

/s/ David Hittner
DAVID HITTNER
United States District Judge.

APPENDIX III

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	§	Case No.
WINDSOR PROPERTIES, INC.,	§	89-06470-H4-11
Debtor.	§	
	§	
BOB YARI,	§	
Claimant,	§	
VS.	§	
WINDSOR PROPERTIES, INC.,	§	
Debtor.	§	

ORDER
(Entered Jul. 19, 1991)

On this 17th day of July, 1991, the Court considered the Motion of John R. Grantham, Chapter 11 Trustee for Windsor Properties, Inc. (the "Trustee") for Summary Judgment on his Amended Objection to the claim of Bob Yari. The Court, having read the papers on file and having considered the argument of counsel, read conclusion into the record based on stipulation and is of the opinion that the Trustee's Motion should be GRANTED. It is, therefore,

ORDERED, ADJUDGED, AND DECREED that the Trustee's Amended Objection to the Claim of Bob Yari is

hereby sustained, and Bob Yari's claim is hereby disallowed.

SIGNED this 17th day of July, 1991.

/s/ William Greendyke
UNITED STATES BANKRUPTCY JUDGE

APPROVED AS TO FORM AND ENTRY REQUESTED

/s/ Louis K. Bonham
Louis K. Bonham
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Attorney for John R. Grantham, Trustee

APPENDIX IV

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-2773

IN THE MATTER OF: WINDSOR PROPERTIES, INC.,

Debtor.

BOB YARI,

Appellant,

Versus

WINDSOR PROPERTIES, INC.,

Appellee.

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING
(March 29, 1993)

Before JOLLY, DUHE and BARKSDALE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/S/ John M. Duhe
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

APPENDIX V

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BOB YARI, Appellant, v. WINDSOR PROPERTIES, INC. and JOHN GRANTHAM, TRUSTEE, Appellees.	§ § § § § § § § § § §	CIVIL ACTION NO. H-91-2281

ORDER
(Entered Sept. 1, 1992)

Pending before this Court is a motion for rehearing (Document #8) filed by appellant Bob Yari ("Yari"). After having considered the motion and the applicable law, the Court

ORDERS that Yari's motion for rehearing (Document #8) is DENIED.

SIGNED at Houston, Texas, on this the 31 day of August, 1992.

/s/ David Hittner
DAVID HITTNER
United States District Judge